

MICHAEL B. STONE, ESQ., Bar #160177  
Attorney at Law  
3020 Old Ranch Parkway, Suite 300  
Seal Beach, CA 90740  
(310) 776-7500  
(310) 861-0647 Fax  
michael.b.stone@att.net

Attorney for Creditor  
ANDRE SOUANG

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re:	)	Case No. 11-59896-SLJ
	)	
DAVID RANDALL TINSLEY BOITANO	)	Chapter 11
and JEANNINE MARIE ASTURIAS-	)	
TINSLEY,	)	R.S. No. RS-MBS-002
	)	
Debtors.	)	SUPPLEMENTAL BRIEF IN SUPPORT
	)	OF MOTION FOR RELIEF FROM THE
	)	AUTOMATIC STAY
	)	
	)	Assigned to Honorable
	)	Stephen L. Johnson
	)	U.S. Bankruptcy Judge

**CREDITOR AND MOVANT, ANDRE SOUANG**, respectfully submits the following supplemental points and authorities, as requested by the Court, in support of his Motion for Relief from the Stay:

**1. THE SUPERIOR COURT ACTION**

Debtors fell behind on their mortgage, and as of June 22, 2010, they had entered into a Forbearance Agreement under which Deutsche Bank and OneWest Bank (the "Lenders") would have the right to foreclose, without further notice to Debtors, if

1 Debtors violated any of its terms (Rec. # 346-347)<sup>1</sup>.

2 On October 12, 2010, Movant purchased the subject real  
3 property at a trustee's sale. (Rec. # 20-23)<sup>2</sup>. Debtors filed a  
4 civil complaint in San Luis Obispo Superior Court seeking  
5 injunctive relief against issuance of the Trustee's Deed (Rec. #  
6 331-347). They obtained a temporary restraining order (Rec. #  
7 293-294), but they did not pursue a preliminary injunction, and  
8 the TRO expired. They later dismissed the complaint (Rec. #  
9 243-245). Movant filed a Lis Pendens (Rec. # 255-259); and a  
10 cross-complaint (Rec. # 217-227) seeking quiet title, specific  
11 performance against the lenders, and damages against the  
12 Tinsleys for rent and for abuse of process. Each Debtor  
13 asserted under oath (Rec. # 343-344) that they had performed the  
14 Forbearance Agreement (Complaint, ¶ 11, Rec. # 333-334). But  
15 Debtors refused to respond to Movant's discovery requesting  
16 proof of this alleged performance (Rec. # 159). They also did  
17 not respond to Petitioner's summary adjudication motion (Rec. #  
18 58-89). However, the Lenders admitted that Debtors had not in  
19 fact performed the Forbearance Agreement (Rec. #49-50,  
20 Undisputed Facts 10 and 11).

21 **2. RELIEF FROM STAY SHOULD BE GRANTED TO PERMIT MOVANT TO**  
22 **PERFECT THE SALE AND TO PERMIT THE LENDERS TO COMPLY WITH THE**  
23 **SUPERIOR COURT'S ORDER GRANTING SPECIFIC PERFORMANCE.**

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25 <sup>1</sup> Citations are to the excerpts of the Superior Court record  
26 previously lodged by movant.

27 <sup>2</sup> The purchase price is presumed to be "a fair and proper  
28 price, or a 'reasonably equivalent value.'" *BFP v.*  
*Resolution Trust Co.*, 511 U.S. 531, 545, 114 S.Ct. 1757, 128  
L.Ed.2d. 556 (1994).

1            "[A] properly conducted trustee's sale is final between the  
2 parties and conclusive as to a bona fide purchaser.

3 (Citations.)" *Melendrez v. D & I Investment, Inc.*, 127  
4 Cal.App.4th 1238, 1249-1250 (Cal. App. 2005).

5            "On request of a party in interest and after notice and a  
6 hearing, the court shall grant relief from the stay [if]

7 (A) the debtor does not have an equity in such property; and

8 (B) such property is not necessary to an effective  
9 reorganization." 11 USC § 362(d)(2).

10           It is not Movant but the Lenders who require relief from  
11 the stay. Movant contends that acts to perfect the sale are  
12 exempt from the stay pursuant to 11 USC § 362(b)(3) (and that  
13 the Superior Court's Order (Rec. # 20-24) was also exempt under  
14 Section 362(b)(3) and therefore valid). The Lenders refuse to  
15 obey the Superior Court Order unless relief from stay is  
16 granted.

17           Relief from the stay is proper to permit Petitioner to  
18 obtain and record the deed and otherwise secure possession of  
19 the premises. *In re Engles*, 193 B.R. 23, 25-26 (Bankr. S.D.  
20 Cal. 1996). "When a purchaser receives equitable title at a  
21 [sale], but legal title remains in a debtor, and the debtor  
22 thereafter files for bankruptcy, cause exists to lift the stay  
23 to allow the equitable owner to gain legal title." *In re*  
24 *Golden*, 190 B.R. 52, 58 (W.D. Pa. 1995). In such cases the  
25 debtor has no equity in the property, nor is the property  
26 necessary for an effective reorganization (see 11 USC §  
27 362(d)(2)). *In re Jewett*, 146 B.R. 250, 252 (9<sup>th</sup> Cir. BAP 1992).  
28

1           “The bankruptcy estate includes ‘all legal and equitable  
2       interests of the debtor in property as of the commencement of  
3       the case.’ 11 U.S.C. § 541(a)(1). Except for the rights of the  
4       bankruptcy trustee to enlarge the bankruptcy estate under 11 USC  
5       §§ 544, *et seq.*, the property interests which pass to the  
6       bankruptcy estate are no more extensive than those possessed by  
7       the debtor as of the date of filing. Filing bankruptcy cannot  
8       revest the debtor with property lost prepetition by foreclosure  
9       or eviction.” *In re Whitlow*, 410 B.R. 220, 223 (Bankr. W.D. Va.  
10      2009).

11      **3. THE SALE CANNOT BE AVOIDED UNDER SECTION 544(a)(3) BECAUSE**  
12      **MOVANT RECORDED A LIS PENDENS, THE TRUSTEE THEREFORE HAS**  
13      **CONSTRUCTIVE NOTICE OF HIS CLAIM, AND THEREFORE THE TRUSTEE**  
14      **CANNOT STAND IN THE SHOES OF A BONA FIDE PURCHASER.**

15           The recordation of a lis pendens imparts constructive  
16       notice of the contents thereof to subsequent purchasers and  
17       mortgagees. *Cal. Civil Code* § 1213.

18           A trustee who has constructive notice of a claim by means  
19       of a properly recorded lis pendens cannot be a bona fide  
20       purchaser. “Although Code § 544(a)(3) elevates a trustee to the  
21       status of a bona fide purchaser even if the debtor had actual  
22       knowledge of an adverse interest, it does not clothe a trustee  
23       with this protective mantle if there was no way, under the  
24       applicable state law, that anyone could attain the status of a  
25       bona fide purchaser. (Citation). Under Code § 544(a)(3),  
26       constructive notice is imputed to a hypothetical purchaser.” *In*  
27       *re Borison*, 226 B.R. 779, 787 (Bankr. S.D. N.Y. 1998).  
28

1       **4.     CONCLUSION**

2           For the foregoing reasons, Creditor and Movant Andre Souang  
3       respectfully submits that his Motion for Relief from the  
4       Automatic Stay should be granted.

5       Dated: January 6, 2012

**LAW OFFICES OF MICHAEL B. STONE**

6                       /S/MICHAEL B. STONE, ESQ.

7                       Attorney at Law

8                       Attorney for Creditor

9                       ANDRE SOUANG  
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1 **PROOF OF SERVICE BY MAIL**

2 I, the undersigned, declare: I am over 18 years of age and  
3 not a party to this action. My business address is 3020 Old  
4 Ranch Parkway, Seal Beach, California 90740. On January 6,  
5 2012, I served the

6 **SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM STAY**

7 on the interested parties: I placed a true copy or copies  
8 thereof in a sealed envelope, first class postage prepaid,  
9 addressed and placed for same-day mailing according to the  
10 regular practice of this office with which I am regularly  
11 familiar, addressed and mailed as follows:

12 Charles B. Greene, Esq., Attorney for Debtors, by CM/ECF System  
13 Jesse W. Jack, Esq., Attorney for Debtors, by CM/ECF System  
14 United States Trustee, by CM/ECF System  
15 Chapter 11 Trustee, by CM/ECF System

16 Christopher E. Schumb, Esq.  
17 10 Almaden Blvd., Suite 1250  
18 San Jose, CA 95113

19 (Attorney for Urban West LLC)

20 Richard J. Bauer, Jr., Esq.  
21 Miles, Bauer, Bergstrom & Winters LLP  
22 1231 E. Dyer Rd., Suite 100  
23 Santa Ana, CA 92705

24 (Attorneys for Wells Fargo Bank, N.A.)

25 Honorable Stephen L. Johnson  
26 U.S. Bankruptcy Judge  
27 280 South First Street, Room 3035  
28 San Jose, CA 95113-3099

I declare under penalty of perjury under the laws of the  
United States that the foregoing is true and correct. Executed  
at Seal Beach, California this 6<sup>th</sup> day of January, 2012.

**/S/MICHAEL B. STONE**